BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the matter of	)	
	)	
Implementation of Section 25	)	
of the Cable Television	)	MM Docket No. 93-25
Consumer Protection and	)	
Competition Act of 1992	)	
	)	
Direct Broadcast Satellite	)	
Public Interest Obligations	)	

PETITION FOR RECONSIDERATION AND CLARIFICATION OF LORAL SPACE AND COMMUNICATIONS LTD.

Philip L. Verveer
Angie Kronenberg
WILLKIE FARR & GALLAGHER
1155 21st St., N.W.
Washington, D.C. 20036
(202) 328-8000

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Pursuant to Section 1.429 of the Commission's rules,[1] Loral Space & Communications Ltd. ("Loral"), by its attorneys, submits this Petition for Reconsideration and Clarification of the Commission's Report and Order released on November 25, 1998 in the above-captioned proceeding.[2]

I. INTRODUCTION AND SUMMARY.

In the Order at issue in this proceeding, the Commission adopted rules to implement Section 25 of the 1992 Cable Act, which imposed public interest obligations only on "providers of direct broadcast satellite service" ("DBS providers"). The

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1 47 C.F.R. § 1.429.

2 In re Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992; Direct Broadcast Satellite Public Interest Obligations, MM Docket No. 93-25, Report and Order (rel. Nov. 25, 1998).

Commission held that a Part 25 Ku-band FSS licensee was "ultimately responsible" for ensuring that the public interest obligations are being met by the video programming distributors that lease or buy capacity from the licensee.[3] The public interest obligations include making capacity available on a reasonable basis to federal, legally-qualified political candidates, providing equal access to such candidates, and setting aside four percent of the video programming capacity for non-commercial, educational and informational programming.

Loral SpaceCom Corporation, a wholly-owned subsidiary of Loral which conducts business as Loral Skynet® ("Skynet"), leases capacity to a video programming distributors on a Part 25 FSS satellite. These distributors offer programming directly to homes.[4]

Loral seeks reconsideration of the Commission's decision to define Part 25 licensees, like Loral, as "DBS providers" subject to the statutory public interest obligations when a Part 25 licensee leases or sells capacity to video programming distributors (DTH providers), regardless of whether the licensee distributes or controls the video programming. The Commission's conclusion is contrary to the language of the statute. The statute specifically defines the "provider of direct broadcast satellite service," which alone is subject to the public interest

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[3] Id. at ¶¶ 21-26; see also 47 C.F.R. § 100.5(a)(2).

[4] Video programming distributors that lease or buy capacity from Part 25 licensees are also known as "DTH providers."

obligations, as an entity that distributes and controls the video programming channels.[5] Congress could have extended its definition to include Part 25 licensees generally, but it did not. There is no adequate justification for requiring Part 25 licensees to be responsible for the public interest obligations when they do not distribute or control the video programming, but merely lease or sell transponders to the actual DBS providers. Moreover, the Commission's decision is inconsistent with the Closed Captioning Order, where the Commission held only DTH providers, not satellite licensees, accountable for ensuring that the programming they offer complies with the FCC's closed captioning rules. Similarly, on reconsideration in this proceeding, the Commission should hold only DTH providers liable for complying with the public interest obligations.

If, however, the Commission affirms its determination to hold Part 25 licensees ultimately responsible for the DBS public interest obligations of DTH providers, the Commission should adopt a rule explicitly authorizing Part 25 licensees to rely upon certificates of compliance from DTH providers to fulfill their compliance obligations. In addition, the Commission should clarify that in determining whether a Part 25 licensee is a DBS provider pursuant to Section 100.5(a)(2), each video programming distributor's channels are counted on an individual basis and that a Part 25 licensee is not obligated to count all of its

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5 See 47 U.S.C. § 335(b)(5)(A)(ii).

satellite capacity towards the total channel capacity that "could be used" to provide video programming.

II. Only Video Programming Distributors That Control 25 Or More Channels Of Video Programming Should Be Responsible For Complying With The DBS Public Interest Obligations.

The Commission was incorrect in concluding that Part 25 Ku-band satellite licensees should be "ultimately responsible" for the public interest obligations of video programming distributors when Part 25 licensees simply make capacity available to the distributors through sale or lease of transponders. The DBS public interest statute imposes obligations only on a "provider of direct broadcast satellite services." Section 335(b)(5)(A)(ii) of the Communications Act defines a "provider of direct broadcast satellite service" as:

> any distributor who controls a minimum number of channels (as specified by Commission regulation) using a Ku-band fixed service satellite system for the provision of video programming directly to the home and licensed under part 25 of title 47 of the Code of Federal Regulations.

In the Order, the Commission completely ignored the language at the beginning of the section which defines a provider of direct broadcast satellite service as one who both distributes and

controls the channels of video programming.[6] The Commission's rule implementing Section 335(b)(5)(A)(ii), defines DBS provider as:

> entities licensed pursuant to part 25 of this title that operate satellites in the Ku-band fixed satellite service and that sell or lease capacity to a video programming distributor that offers service directly to consumers providing a sufficient number of channels so that four percent of the total applicable programming channels yields a set-aside of at least one channel of non-commercial programming pursuant to subsection c of this rule[7]

This rule inexplicably omits the statutory requirement that the DBS provider be the distributor that controls the video programming channels. The Commission's determination to hold Part 25 licensees that are not "distributors" or that do not "control" channels for DTH service liable for complying with the DBS public interest obligations is directly contrary to the language of the statute. For this reason alone, the Commission must reconsider its definition of DBS providers for purposes of Section 335(b)(5)(A)(ii).

First, under the statute, a "provider of direct broadcast satellite service" must be a "distributor."[8] The Commission determined in the Order that a provider of DBS services is the entity that "provides programming to the public."[9] In addition, it held that "video programming distributors" are defined as "all

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6 See Order, at ¶ 21.

7 See 47 C.F.R. § 100.5(a)(2).

8 See 47 U.S.C. § 335(b)(5)(A)(ii).

9 See Order, at ¶ 6.

entities who provide video programming directly to customers' homes . . . ."[10] Thus, for purposes of Section 335(b)(5)(A)(ii), a "distributor" is a video programming distributor that provides video programming directly to homes. Accordingly, under the Commission's own definitions, a Part 25 licensee should not be considered a "video programming distributor" when it merely leases or sells transponder capacity to entities that provide and market the video programming service directly to homes. For this reason, a Part 25 licensee that only leases or sells transponder capacity to entities that in turn provide a video programming service directly to homes is not a "distributor" under Section 335(b)(5)(A)(ii).

Second, the statute requires that a "provider of direct broadcast satellite service" be a distributor that "controls a minimum number of channels."[11] Part 25 licensees that lease or sell transponders to DTH distributors do not determine the content of programming that goes on the channels. The distributor determines the programming to carry. Therefore, because the distributor leasing or purchasing capacity distributes the programming and controls the channels, not the Part 25 satellite licensee/lessor, the distributor should be the only entity that is responsible for meeting the DBS public interest obligations.

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[10] Id., at note 53.

[11] See 47 U.S.C. § 335(b)(5)(A)(ii).

If Congress intended to hold the Part 25 licensee responsible, it would have used language as clear as the language in Section 335(b)(5)(A)(i) which states that a DBS provider is "a licensee for a Ku-band satellite system under part 100 of Title 47 of the Code of Federal Regulations."[12] Instead, Congress said that a DBS provider is "any distributor who controls a minimum number of channels using a Ku-band fixed service satellite system for the provision of video programming directly to the home . . ."[13] The reason for the distinction in the language is that Congress knew that DTH services could be offered from FSS satellites licensed to operate in the Ku-band under Part 25. In fact, at the time of the enactment of this section, PRIMESTAR was leasing capacity from GE American Communications, Inc. ("GE Americom") to provide eleven channels of DTH service from a Part 25 licensed Ku-band satellite. Congress wanted to require distributors like PRIMESTAR to be held to the same requirements as Part 100 DBS licensees even if they happened to be operating only a medium power Ku-band DTH service, not licensed under Part 100. It did so by defining a DBS provider as a distributor who controls channels of video programming on a Ku-band satellite licensed under Part 25. For this reason, Loral disputes the Commission's conclusion that the section is ambiguous.[14] Clearly, Congress intended that only entities that distribute and

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12 47 U.S.C. § 335(b)(5)(A)(i).

13 47 U.S.C. § 335(b)(5)(A)(ii).

14 See Order, at ¶ 23.

control the video programming distributed to homes would be responsible for the public interest obligations, not the Part 25 licensees who merely lease or sell transponder capacity.

Nor is the Commission's decision to broaden the scope of the statute's definition of DBS providers warranted by its assertion that doing so would facilitate enforcement. Contrary to the Commission's assertion, its enforcement powers are not limited with respect to non-licensees.[15] Indeed, the Commission has previously relied upon its ability to enforce FCC rules upon unlicensed DTH providers. In the Closed Captioning Order, the Commission determined that all video programming distributors, including DTH providers, whether licensed or not, were responsible for ensuring that the programming carried on their systems meets the closed captioned obligations.[16] Since the Commission held DTH providers accountable for closed captioning requirements in that regulatory regime, there is no reason why it cannot do so here.[17]

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15 See id.

16 See In re Closed Captioning and Video Description of Video Programming; Implementation of Section 305 of the Telecommunications Act of 1996; Video Programming Accessibility, Report and Order, MM Docket No. 95-176, 13 FCC Rcd 3272, at ¶ 27 (1997).

17 Perhaps one reason why the FCC did not believe it would be difficult to enforce the closed captioning rules on DTH providers is because they typically need an FCC license to conduct a portion of their business. For example, the DTH provider that currently leases capacity from Skynet uses a licensed earth station to uplink its programming to Skynet's satellite.

While the Commission seemed to contemplate in its Order that GE Americom (due to its relationship with PRIMESTAR) would be the only Part 25 licensee that would be affected by its interpretation,[18] that is not the case. Skynet leases capacity to DTH providers and expects that it may lease capacity to other DTH providers in the future. GE Americom has an ownership interest in PRIMESTAR and due to that relationship may not have any issue with convincing PRIMESTAR to comply with the obligations and make a certification to GE Americom regarding that compliance. Skynet, on the other hand, does not have the same leverage in existing relationships and may encounter difficulty in obtaining cooperation from those leasing its capacity.

III. If The Petition For Reconsideration Is Not Granted, The Commission Must Clarify Its Rules To Reduce Uncertainty.

If, on reconsideration, the Commission affirms that Part 25 licensees that lease or sell capacity to DTH providers, but do not distribute or control programming should, nevertheless, be responsible for DTH providers' compliance with the DBS public interest obligations, Loral seeks several clarifications of the Commission's rules.

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[18] See Order, at ¶ 6 and App. C, § C ("[t]here is one licensee of DBS services under part 25 of the Commission's rules, GE Americom . . . .")

A. The Commission Should Permit Part 25 Licensees To Rely Upon The Certification Process For All The DBS Public Interest Obligations And The Commission Should Include The Certification Policy In Its Rules.

The current rules in Section 100.5(b) and (c) are confusing in part because they do not distinguish between those Part 25 licensees that may rely upon certifications of compliance and those that may not. For instance, Section 100.5(c)(6) requires DBS providers to keep and maintain certain public files for inspection, but it does not indicate that a Section 100.5(a)(2) "DBS provider" (a Part 25 licensee that leases or sells transponders) may rely upon a certification that the video programming distributor is complying with that obligation. Without a clarification that Section 100.5(a)(2) licensees, as "DBS providers", may rely upon the distributor's certification that all the obligations in Section 100.5(b) and (c) are being met, it is not transparent that the video programming distributor is responsible for complying with the obligations.

In addition, Loral seeks a clarification that Part 25 licensees may rely upon certifications of compliance from video programming distributors for both the non-commercial educational and informational programming set-aside and the political access requirements. In the Order, the Commission determined that the definition of a DBS provider for Section 335(a) which contains the political access requirements is the same as the definition of a DBS provider in Section 335(b).[19] Accordingly, the

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[19] Order, at ¶ 27.

Commission should clarify that Part 25 licensees may rely upon certifications of compliance from DTH providers that they are meeting the obligations for both Section 335(a) and Section 335(b). Moreover, consistent with the Commission's holding in the Closed Captioning Order and the fact that Part 25 licensees may merely provide space segment capacity and not control a DTH provider's channels,[20] the Commission should permit such Part 25 licensees to rely upon the accuracy of the certificates of compliance without requiring the licensee to verify such compliance. Verification would be burdensome for licensees. In addition, Part 25 licensees should not be held liable for compliance where a provider falsely certifies that the public interest obligations are being met.[21]

To codify the certification policy and clarify that licensees may rely upon a distributor's certification for all the obligations in Section 100.5(b) and (c), Loral proposes the following new rule in Part 100.5:

> (d) Certifications of Compliance:
>
> (1) An entity defined in Section 100.5(a)(2) shall be deemed to have complied with Section 100.5(b) and (c) upon receipt of a certification of compliance from a video programming distributor that states that the distributor is complying with Section 100.5(b) and (c).
>
> (2) If a certification is relied upon by an entity defined in Section 100.5(a)(2) for the obligations contained in Section 100.5(b) and (c), then the video programming distributor is the DBS provider/operator for the purposes of Section 100.5(b) and (c).

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20 See Closed Captioning Order, at ¶¶ 27-28.

21 See id., at ¶ 28.

By clarifying in its rules that a Part 25 licensee is deemed to be in compliance with Section 100.5(b) and (c) when it receives a certificate of compliance from a video programming distributor, the Commission will provide greater certainty to satellite operators and more narrowly tailor its compliance obligations.

B. The Commission Must Clarify That In Determining Whether A Part 25 Licensee Is A DBS Provider Pursuant To Section 100.5(a)(2), Each Video Programming Distributor's Channels Are Counted On An Individual Basis.

In the Order, the Commission held that a Part 25 licensee will be a DBS provider for purposes of the DBS public interest obligations if it sells or leases capacity to a video programming distributor that offers service directly to consumers providing a sufficient number of channels (25), so that it must set aside one channel (4% of its capacity).[22] Specifically, the relevant rule (Section 100.5(a)(2)) states:

> DBS providers are subject to the public interest obligations set forth in paragraphs (b) and (c) below. For purposes of this rule, DBS providers are any of the following:
>
> > (2) entities licensed pursuant to part 25 of this title that operate satellites in the Ku-band fixed satellite service and that sell or lease capacity to a video programming distributor that offers service directly to consumers providing a sufficient number of channels so that four percent of the total applicable programming channels yields a set-aside of at least one channel of non-commercial programming pursuant to subsection c of this rule,

Loral believes that this rule requires Part 25 licensees leasing or selling capacity to video programming distributors to count each video programming distributor's channels on an individual

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[22] Order, at ¶ 28.

basis for determining whether the licensee is a DBS provider for purposes of Section 100.5. In other words, Loral does not believe that the Commission intends for Part 25 licensees to aggregate the channels of all the video programming distributors it carries in determining whether the licensee is a DBS provider.

Loral believes that the obligations should apply to a Part 25 licensee only when it leases or sells transponder space to a video programming distributor that individually offers 25 or more channels of video programming. For example, if A leases satellite capacity from Licensee and offers 40 channels of video programming directly to homes, then Section 100.5(b) and (c) would apply to A, and A would have to certify compliance with the public interest obligations. If, however, A provides 30 channels while another distributor, B, provides 10 channels, Section 100.5(b) and (c) would apply for A (for the 30 channels), but not for B. Likewise, if A were providing 15 channels and B were providing ten channels, then Section 100.5(b) and (c) would not apply to A, B ,or Licensee at all. This interpretation of the rule is supported by the intent of Congress which was to ensure that each video programming distributor set aside channels for public interest programming only if it provides the minimum number of video programming channels as prescribed by the Commission.[23]

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[23] See 47 U.S.C. § 335(b)(5)(A)(ii).

C. The Commission Should Clarify That A Part 25 Licensee Is Not Obligated To Count All Of Its Satellite Capacity As Capacity That "Could Be Used" To Provide Video Programming.

The Commission concluded in the Order that channel capacity that "is being, or could be, used to provide video programming" will be counted towards a DBS provider's total channel capacity. In addition, the Commission stated that "unused channels that could be used to provide DBS service will be included in the set aside calculation."

This policy would require Part 25 licensees to count towards its total channel capacity any portion of a Ku-band satellite that "could be used" to provide video programming, even if that capacity has not been sold or leased to a video programming distributor. In reality all of the Ku-band satellites licensed in Part 25 "could be used" to provide DTH video programming; however, that typically is not the case. For instance, Skynet is leasing only a portion of its satellite capacity to video programming distributors. Thus, Skynet should only be held accountable for the capacity, on an individual basis, that video programming distributors use to provide programming directly to homes. For this reason, the Commission should clarify that Part 25 licensees need only count the capacity which is being used to transmit programming directly to homes that the licensee has leased or sold to an individual video programming distributor.

Likewise, if a video programming distributor that leases or buys capacity from a Part 25 licensee determines that it is more economical to use some of its capacity to provide services other

than video programming, that capacity should not be counted towards the total channel capacity that could be used for video programming. This is consistent with the Commission's finding in the Order that video programming and non-video programming channels should not be the baseline measurement because "DBS providers using their capacity for data or audio transmission cannot insert noncommercial video programming on those channels at all."[24]

Finally, if a video programming distributor that leases or buys capacity from a Part 25 licensee determines to allow that capacity to remain idle, the Commission should not count it towards channel capacity that could be used to provide video programming. The video programming distributor has made a business decision not to utilize all of its capacity. The Commission should not penalize that distributor by imposing a disproportionately burdensome channel set-aside obligation. The public interest obligations should apply only when the video programming distributor actually provides 25 or more channels of video programming.

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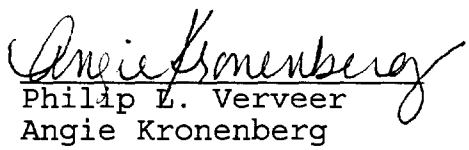
[24] See Order, at ¶ 70.

IV. CONCLUSION.

For the foregoing reasons, Loral respectfully requests the Commission to reconsider its decision to define Part 25 Ku-band licensees as DBS providers if they lease or sell capacity to DTH providers that offer 25 or more channels of programming. If, however, the Commission affirms that decision, Loral respectfully requests clarification of the Commission's rules and policies as discussed in Section III.

Respectfully submitted,

By: 

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Washington, D.C. 20036
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